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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CITY OF WESTLAND POLICE AND FIRE RETIREMENT SYSTEM and PLYMOUTH COUNTY RETIREMENT SYSTEM, On Behalf of Themselves and All Others Similarly Situated, Plaintiffs, vs. SONIC SOLUTIONS, et al., Defendants.	No. C 07-05111-CW CLASS ACTION NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND THE PLAN OF ALLOCATION OF SETTLEMENT PROCEEDS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF DATE: April 8, 2010 TIME: 2:00 p.m. COURTROOM: The Honorable Claudia Wilken

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TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE that, pursuant to an Order of the Court filed December 2, 2009, on April 8, 2010, at 2:00 p.m., or as soon thereafter as counsel may be heard, at the United States Courthouse, 1301 Clay Street, Oakland, California, before the Honorable Claudia Wilken, United States District Judge, Lead Plaintiffs will and hereby move for approval of the Settlement and the Plan of Allocation of settlement proceeds. Lead Plaintiffs' motion is based on the attached Memorandum of Points and Authorities in Support of Final Approval of Class Action Settlement and the Plan of Allocation of Settlement Proceeds, the Joint Declaration of Shawn A. Williams and Jonathan Gardner in Support of Final Approval of Class Action Settlement, Plan of Allocation of Settlement Proceeds, and Award of Attorneys' Fees and Expenses ("Joint Declaration"), the Declaration of Carole K. Sylvester Re A) Mailing of the Notice of Proposed Settlement of Class Action and the Proof of Claim and Release Form, and B) Publication of the Summary Notice ("Sylvester Declaration"), the Stipulation of Settlement dated as of October 12, 2009, all other pleadings and matters of record, and such additional evidence or argument as may be presented at the hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY OF ARGUMENT

Lead Plaintiffs respectfully submit this memorandum of points and authorities in support of their motion for final approval of the proposed settlement of this class action for cash consideration of $5,000,000. The compromise reached is the result of arm's-length and mediator-assisted negotiations, and, in Lead Counsel's view, reflects a fair resolution of the parties' respective claims and defenses.

This Litigation began in October 2007, with the filing of class action complaints asserting that Defendants violated federal securities laws by issuing false and misleading statements about Sonic Solutions ("Sonic") during the Settlement Class Period. Lead Plaintiffs contended that Defendants falsified Sonic's financial statements and concealed the backdating of stock option grants to Sonic employees. Lead Plaintiffs alleged that Defendants' actions resulted in the inflation of the price of Sonic securities during the Settlement Class Period and that the Settlement Class

suffered financial harm. An overview of Lead Plaintiffs' claims and the history of the litigation leading to this Settlement are detailed in the Joint Declaration, filed herewith. The Court is respectfully referred to the Joint Declaration for a detailed discussion of the factual and procedural history of the Litigation.

Pursuant to an Order of the Court filed December 2, 2009, the Notice of Proposed Settlement of Class Action (the "Notice") was mailed to over 50,000 potential Settlement Class Members beginning on December 10, 2009. In addition, a summary notice was published in *Investor's Business Daily* on December 18, 2009.[1] The last day to file objections to any aspect of the settlement will be February 4, 2010. As of the date of this filing, Lead Counsel are not aware of any objections to the Settlement or to the Plan of Allocation. Lead Counsel will address any objections received in a reply brief.

Federal Rule of Civil Procedure 23(e) requires the settlement to be fair, adequate, and reasonable. The factors analyzed in this Circuit to determine the fairness of a class action settlement are set forth in *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982), and are discussed in detail below. In sum, Lead Counsel firmly believe that this Settlement is fair, reasonable and adequate based on their extensive investigation, interviews with potential witnesses, consultation with expert consultants, the amount obtained in settlement versus the risk of obtaining a larger judgment at trial, the certainty of a recovery versus the risks of no recovery at trial, past experience in other class actions, and the serious disputes between the parties concerning damages and liability. Thus, Lead Counsel recommend that the Settlement be approved by this Court.[2]

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[1] *See* paragraphs 3 through 11 of the Sylvester Declaration, filed herewith.

[2] In reviewing this settlement under Rule 23, the Court is not required to substitute its business judgment for that of these counsel, *Steinberg v. Carey*, 470 F. Supp. 471 (S.D.N.Y. 1979); the settlement should be approved if it is within a "range of reasonableness," *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972).

II. THE STANDARDS FOR JUDICIAL APPROVAL OF CLASS ACTION SETTLEMENTS

It is well established in the Ninth Circuit that "voluntary conciliation and settlement are the preferred means of dispute resolution." *Officers for Justice*, 688 F.2d at 625. Class action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome and the typical length of the litigation. "[T]here is an overriding public interest in settling and quieting litigation," and this is "particularly true in class action suits." *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976); *Util. Reform Project v. Bonneville Power Admin.*, 869 F.2d 437, 443 (9th Cir. 1989).[3]

In approving a proposed settlement of a class action under Federal Rule of Civil Procedure 23(e), the court must find that the proposed settlement is "fair, adequate and reasonable."[4] The Ninth Circuit has provided a list of factors which may be considered in evaluating the fairness of a class action settlement:

> Although Rule 23(e) is silent respecting the standard by which a proposed settlement is to be evaluated, the universally applied standard is whether the settlement is fundamentally fair, adequate and reasonable. The district court's ultimate determination will necessarily involve a balancing of several factors which may include, among others, some or all of the following: the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

Officers for Justice, 688 F.2d at 625 (citations omitted). *Accord Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 720 F. Supp. 1379 (D. Ariz. 1989), *aff'd sub nom. Class Plaintiffs v. Seattle*, 955 F.2d 1268 (9th Cir. 1992).

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[3] The law always favors the compromise of disputed claims, *Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910); *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995); *MWS Wire Indus., Inc. v. Cal. Fine Wire Co.*, 797 F.2d 799, 802 (9th Cir. 1986); including those asserted in stockholder class actions, *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982).

[4] *Pac. Enters.*, 47 F.3d at 377; *Officers for Justice*, 688 F.2d at 625; *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977).

The district court must exercise "sound discretion" in approving a settlement. *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980), *aff'd*, 661 F.2d 939 (9th Cir. 1981); *Torrisi*, 8 F.3d at 1375. However, a strong initial presumption of fairness attaches to the proposed settlement if the settlement is reached by experienced counsel after arm's-length negotiations, and great weight is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation. *Hughes v. Microsoft Corp.*, No. C98-1646C, 2001 U.S. Dist. LEXIS 5976, at *21 (W.D. Wash. Mar. 26, 2001). Therefore, in exercising its discretion, "the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Officers for Justice*, 688 F.2d at 625. The Ninth Circuit defines the limits of the inquiry to be made by the Court in the following manner:

> Therefore, the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits. Neither the trial court nor this court is to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is not to be judged against a hypothetical or speculative measure of what ***might*** have been achieved by the negotiators.

Id. (emphasis in original). As explained below and in the Joint Declaration, application of these criteria shows that this Settlement warrants the Court's approval.

Moreover, "[t]he recommendations of plaintiffs' counsel should be given a presumption of reasonableness." *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979). The presumption of reasonableness in this action is fully warranted because the Settlement is the product of arm's-length negotiations, including two separate mediations. *Hughes*, 2001 U.S. Dist. LEXIS 5976, at *17 (citing *Pac. Enters.*, 47 F.3d at 378) (finding mediator's involvement supports settlement approval). Finally, it is the considered judgment of counsel for the parties that this Settlement is a

fair, reasonable, and adequate resolution of the Litigation. *See Hughes*, 2001 U.S. Dist. LEXIS 5976, at *20-*21; *Manual for Complex Litigation* §30.42 (3d ed. 1995).[5]

III. THE SETTLEMENT MEETS THE NINTH CIRCUIT STANDARD FOR APPROVAL

A. The Parties Could Identify the Strengths and Weaknesses of Their Cases

The stage of the proceedings and the amount of discovery completed is one of the factors that courts consider in determining the fairness, reasonableness, and adequacy of a settlement. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000); *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975); *see also Weinberger*, 698 F.2d at 74; *Ellis*, 87 F.R.D. at 18; *Boyd*, 485 F. Supp. at 616-17.

Lead Counsel conducted informal investigations, including interviews of potential witnesses, worked with consultants, and researched the law regarding the claims and defenses asserted. The parties also participated in mediation sessions with the Honorable Howard B. Wiener (Ret.) and the Honorable Layn R. Phillips (Ret.), where each side's claims and defenses were thoroughly explored. As a result, Lead Counsel have a comprehensive understanding of the strengths and weaknesses of the case and have sufficient information to make an informed decision regarding the fairness of the Settlement before presenting it to the Court. *See Mego Fin.*, 213 F.3d at 459 (finding parties could identify strengths and weaknesses of claims without formal discovery).

B. The Settlement Appropriately Balances the Risks of Litigation and the Benefit to the Settlement Class of a Certain Recovery

To determine whether the proposed settlement is fair, reasonable, and adequate, the Court must balance the continuing risks of litigation against the benefits afforded to Settlement Class Members and the immediacy and certainty of a substantial recovery. *Mego Fin.*, 213 F.3d at 458; *Girsh*, 521 F.2d at 157; *Boyd*, 485 F. Supp. at 616-17; *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 741 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986). In other words, "'[t]he Court

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[5] *Accord Malchman v. Davis*, 761 F.2d 893, 903 (2d Cir. 1985); *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y.), *aff'd*, 117 F.3d 721 (2d Cir. 1997).

shall consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation. In this respect, "[i]t has been held proper to take the bird in hand instead of a prospective flock in the bush."'" *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004) (citations omitted).

In the context of approving class action settlements, courts attempting to balance these factors have recognized "that stockholder litigation is notably difficult and notoriously uncertain." *Lewis v. Newman*, 59 F.R.D. 525, 528 (S.D.N.Y. 1973); *see also Republic Nat'l Life Ins. Co. v. Beasley*, 73 F.R.D. 658 (S.D.N.Y. 1977). This is even more so today, in this post-Private Securities Litigation Reform Act of 1995 ("PSLRA") environment, amid defendants' constant attempts to push the envelope and contours of the PSLRA. *In re Ikon Office Solutions, Inc.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000) ("securities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA"). In particular, the Ninth Circuit's decisions in *In re Silicon Graphics Sec. Litig.*, 183 F.3d 970, 974 (9th Cir. 1999) and its progeny have interpreted the PSLRA's heightened pleading standards in an expansive manner and have established what is commonly accepted to be the most stringent standards of any circuit to pleading a successful §10(b) claim.

Here, a balance of these factors weighs heavily in support of approval of the Settlement and unquestionably outweighs another distinct possibility – no recovery for the Settlement Class.

1. Continued Litigation Posed Substantial Risks in Establishing Liability

In order to prevail on their §10(b) claims at trial, Lead Plaintiffs would have had the burden of establishing the liability of Defendants to the satisfaction of the jury and the Court. Lead Plaintiffs would have had to prove, *inter alia*, that the alleged misstatements were material, *TSC Indus. v. Northway, Inc.*, 426 U.S. 438 (1976), and made with scienter (actual knowledge or reckless disregard for the truth), *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976). Accordingly, in order to prevail on the §10(b) claims, Lead Plaintiffs would have had to prove Defendants participated in the public dissemination of misleading information, that the information was material to investors in determining whether to purchase Sonic securities, that the information materially affected the price

of Sonic securities, and that Defendants withheld information either with actual intent to deceive, manipulate, or defraud, or that Defendants recklessly disregarded these facts and their consequences.

Here, there was a significant risk that the Court would again dismiss the §10(b) claims for failure to adequately plead scienter. Other courts have found that the applicable accounting standards were not clear, which could support a conclusion that there was no intentional failure to use the proper accounting treatment and thus no evidence of scienter.

Assuming the §10b claims were upheld, a class was certified and survived summary judgment, the risks of establishing liability posed by the conflicting testimony and evidence at trial would be exacerbated by the unpredictability of a lengthy and complex jury trial; the risk that the jury would find that the asserted misrepresentations were not material; and the risk that the jury would find that Defendants reasonably believed in the appropriateness of their actions at the time and that Lead Plaintiffs failed to prove that Defendants acted with the requisite scienter. Lead Plaintiffs' burden to prove scienter at trial cannot be underestimated. Proof of scienter for each defendant is complex and involves exploration of the individual's state of mind. Lead Plaintiffs would need to prove what each Individual Defendant knew about the alleged wrongdoing and at what point in time they had or should have had such knowledge.

Although Lead Plaintiffs believe their securities claims are meritorious and fully supported by the evidence obtained to date, further litigation to establish liability posed a potential threat to any recovery.

2. Continued Litigation Posed Substantial Risks in Proving Damages

Lead Counsel are mindful that if they were able to overcome the obstacles to establishing liability at trial, they would still face the additional risks of proving loss causation and damages. Lead Counsel believe that if they continued to trial they would be able to establish damages significantly higher than the settlement amount. However, this assumes that Lead Plaintiffs prevail on the damage issues presented in this case. The Court dismissed Lead Plaintiffs' §10(b) and control person claims and those claims gave rise to all but a small percentage of the damages estimated by Lead Plaintiffs' damages consultant. There was substantial disagreement whether the Court would

sustain their §10(b) claims in connection with a motion to dismiss the complaint, or whether the Court would dismiss them for a second time.

In addition, the United States Supreme Court has confirmed that the law requires that "a plaintiff prove that the defendant's misrepresentation (or other fraudulent conduct) proximately caused the plaintiff's economic loss." *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 346 (2005). At trial, Defendants' experts would likely contend that all of the losses experienced by the Settlement Class were due to factors completely unrelated to any alleged misconduct of Defendants related to backdating of options, thereby eliminating any potential recovery.

Moreover, expert testimony is necessary in order to fix the amount – and indeed the existence – of actual damages. *See, e.g.*, *Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 576-78 (2d Cir. 1982). Such an expert evaluation is based not only on stock price history but on other more elusive factors, including corporate asset value, cash flow, income and growth prospects for the future, industry and economic trends, the quality of management, the nature and amount of liabilities, and many other variables. At trial, Lead Plaintiffs would likely have faced a motion *in limine* by Defendants to preclude their damage expert's testimony under the *Daubert* test and risked a decision that the expert's valuation model might not be admissible in evidence.

If Lead Plaintiffs survived the *Daubert* motion, the loss causation analysis and damage valuations of Lead Plaintiffs' and Defendants' experts would vary substantially. In the "battle of experts," it is impossible to predict with any certainty which arguments would find favor with the jury. *See Warner Commc'ns*, 618 F. Supp. at 744-45 (approving settlement where "it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found to have been caused by actionable, rather than the myriad nonactionable factors such as general market conditions"); *see also Chatelain v. Prudential-Bache Sec.*, 805 F. Supp. 209, 214 (S.D.N.Y. 1992); *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 542 (S.D. Fla. 1988), *aff'd*, 899 F.2d 21 (11th Cir. 1990). Thus, even if the Settlement Class prevailed in establishing liability, significant additional risks would remain in establishing the existence of damages.

While Lead Plaintiffs contend that the aggregate damages that could be established at trial would be as high as $62 million, such result assumes that ***all significant liability and damage issues would have been resolved in favor of the Settlement Class***.[6] Setting aside the possibility that actual provable damages could ultimately have been a small fraction of Lead Plaintiffs' preliminary damage analysis, courts routinely approve settlements providing recoveries representing a percentage of the potential recovery. "It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery will not ***per se*** render the settlement inadequate or unfair." *Officers for Justice*, 688 F.2d at 628 (emphasis in original). The Second Circuit has observed:

> The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.
>
> * * *
>
> ***In fact there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.***

Detroit v. Grinnell Corp., 495 F.2d 448, 455 & n.2 (2d Cir. 1974) (emphasis added).

In summary, although Lead Counsel believe that the case is meritorious, their experience has taught them how the risks discussed above can render the outcome of a trial extremely uncertain. *See In re Mfrs. Life Ins. Co. Premium Litig.*, MDL No. 1109, 1998 U.S. Dist. LEXIS 23217, at *17 (S.D. Cal. Dec. 21, 1998) ("even if it is assumed that a successful outcome for plaintiffs at summary judgment or at trial would yield a greater recovery than the Settlement – which is not at all apparent – there is easily enough uncertainty in the mix to support settling the dispute rather than risking no recovery in future proceedings"). Moreover, even if Lead Plaintiffs were to prevail at trial, risks to the Settlement Class remain. For example, in *In re Apple Computer Sec. Litig.*, No. C-84-20148(A)-JW, 1991 U.S. Dist. LEXIS 15608 (N.D. Cal. Sept. 6, 1991), a case litigated and tried in this district, the jury rendered a verdict for plaintiffs after an extended trial. Based upon the jury's findings, recoverable damages would have exceeded $100 million. However, the court overturned the verdict,

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[6] Lead Plaintiffs would have faced a significant challenge to prove any sizeable damages on the remaining §14(a) claim.

entering judgment n.o.v. for the individual defendants, and ordered a new trial with respect to the corporate defendant. In another case, the class won a jury verdict and a motion for j.n.o.v. was denied, but on appeal the judgment was reversed and the case dismissed. *Backman v. Polaroid Corp.*, 910 F.2d 10 (1st Cir. 1990). *See also Robbins v. Koger Props., Inc.*, 116 F.3d 1441, 1449 (11th Cir. 1997) (reversing on appeal $81 million jury verdict and dismissing securities action with prejudice); *AUSA Life Ins. Co. v. Ernst & Young*, 39 Fed. Appx. 667 (2d Cir. 2002) (affirming district court's dismissal after a full bench trial and earlier appeal and remand); *Winkler v. NRD Mining, Ltd.*, 198 F.R.D. 355 (E.D.N.Y.) (granting defendants' motion for judgment as a matter of law after jury verdict for plaintiffs), *aff'd sub nom. Winkler v. Wigley*, 242 F.3d 369 (2d Cir. 2000). Therefore, careful consideration of the above risks supports approval of the Settlement as fair, adequate, and reasonable.

3. Balancing the Certainty of an Immediate Recovery Against the Expense and Likely Duration of Protracted Litigation and Trial Favors Settlement

The immediacy and certainty of a recovery is a factor for the Court to balance in determining whether the proposed settlement is fair, adequate, and reasonable. *E.g.*, *Girsh*, 521 F.2d at 157. Courts consistently have held that "[t]he expense and possible duration of the litigation should be considered in evaluating the reasonableness of [a] settlement." *Milstein v. Huck*, 600 F. Supp. 254, 267 (E.D.N.Y. 1984); *Officers for Justice*, 688 F.2d at 626; *Boyd*, 485 F. Supp. at 616-17; *Bullock v. Adm'r of Estate of Kircher*, 84 F.R.D. 1, 10 (D.N.J. 1979). Therefore, the benefit of the present Settlement must also be balanced against the expense of achieving a more favorable result at trial. *Young v. Katz*, 447 F.2d 431, 433 (5th Cir. 1971).

Approval of the Settlement will mean a present recovery for eligible claimants. If not for this Settlement, the case would have continued through discovery, summary judgment, trial, and likely appeal. A trial would have occupied a number of attorneys for many weeks and would have required substantial and costly expert testimony on both sides. Moreover, a judgment favorable to the Settlement Class, in light of the contested nature of virtually every aspect of this case, would unquestionably be the subject of post-trial motions and further appeals, which could prolong the case for several more years. *See, e.g.*, *Warner Commc'ns*, 618 F. Supp. at 745 (delay from appeals is a

factor to be considered). Therefore, delay, not just at the trial stage, but through post-trial motions and the appellate process as well, could force Settlement Class Members to wait many more years for any recovery, further reducing its value. Accordingly, settlement of this Litigation will ensure a recovery, and eliminate the risk of no recovery at all. Therefore, it is in the best interest of the Settlement Class.

As the Ninth Circuit has made clear, the very essence of a settlement agreement is compromise, "'a yielding of absolutes and an abandoning of highest hopes.'" *Officers for Justice*, 688 F.2d at 624 (citation omitted).

> "Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with litigation. . . ."

Id. (citation omitted); *Ellis*, 87 F.R.D. at 19 (as a *quid pro quo* for not having to undergo the uncertainties and expenses of litigation, the plaintiffs must be willing to moderate the measure of their demands). Accordingly, the fact that the Settlement Class potentially could have achieved a greater recovery after trial does not preclude the Court from finding that the Settlement is within a "range of reasonableness" that is appropriate for approval. *E.g.*, *Warner Commc'ns*, 618 F. Supp. at 745.

C. The Recommendations of Experienced Counsel Heavily Favor Approval of the Settlement

Experienced counsel, negotiating at arm's length, have weighed the factors discussed above and endorse the Settlement. As courts have stated, the view of the attorneys actively conducting the litigation, while not conclusive, "is entitled to significant weight." *Fisher Bros. v. Cambridge-Lee Indus., Inc.*, 630 F. Supp. 482, 488 (E.D. Pa. 1985); *Ellis*, 87 F.R.D. at 18 ("the fact that experienced counsel involved in the case approved the settlement after hard-fought negotiations is entitled to considerable weight").

This action has been litigated and settled by experienced and competent counsel on both sides of the case. Lead Counsel are well known for their experience and success in complex and class action litigation. That such qualified and well-informed counsel endorse the Settlement as

being fair, reasonable, and adequate to the Settlement Class heavily favors this Court's approval of the Settlement.

D. Reaction of the Settlement Class Supports Approval of the Settlement

Notices of the Settlement were sent to over 50,000 potential Settlement Class Members and a summary notice was published in *Investor's Business Daily* on December 18, 2009. The time period for objecting to the Settlement will expire on February 4, 2010. To date, no objections to the Settlement have been filed.

Moreover, in the event objections are received, courts routinely approve settlements if they otherwise meet the fairness requirements. *See, e.g.*, *Mfrs. Life*, 1998 U.S. Dist. LEXIS 23217, at *24 ("[A] minuscule number of objectors is another factor favoring approval."); *Boyd*, 485 F. Supp. at 624 (adequacy of settlement "persuasive" when 16% of class objected); *Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 118-19 (3d Cir. 1990) (fact only 10% of class objected "strongly favors settlement"); *Nat'l Rural*, 221 F.R.D. at 529 (absence of large number of objections raises a strong presumption settlement is fair to class).

IV. THE PLAN OF ALLOCATION IS FAIR, REASONABLE, AND ADEQUATE AND SHOULD BE APPROVED BY THE COURT

Assessment of a plan of allocation of settlement proceeds in a class action under Rule 23 of the Federal Rules of Civil Procedure is governed by the same standards of review applicable to the settlement as a whole – the plan must be fair, reasonable, and adequate. *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1284 (9th Cir. 1992). An allocation formula need only have a reasonable basis, particularly if recommended by experienced class counsel. *White v. NFL*, 822 F. Supp. 1389, 1420-24 (D. Minn. 1993); *In re Am. Bank Note Holographics*, 127 F. Supp. 2d 418, 429-30 (S.D.N.Y. 2001).

District courts enjoy "broad supervisory powers over the administration of class-action settlements to allocate the proceeds among the claiming class members . . . equitably." *Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978); *accord In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d 228, 238 (5th Cir. 1982). Numerous courts have approved distribution plans that allocate the settlement proceeds according to the relative strengths and weaknesses of the various claims. *See*

Warner Commc'ns, 618 F. Supp. at 745; *Weinberger*, 698 F.2d at 78. Thus, "if one set of claims had a greater likelihood of ultimate success than another set of claims, it is appropriate to weigh 'distribution of the settlement . . . in favor of plaintiffs whose claims comprise the set' that was more likely to succeed." *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1396, 1411 (E.D.N.Y. 1985) (quoting *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 220 (5th Cir. 1981)), *aff'd in part and rev'd in part on other grounds*, 818 F.2d 179 (2d Cir. 1987). Moreover, there is no requirement that a settlement must benefit all class members equally. *See Mego Fin.*, 213 F.3d at 461; *Petrovic v. AMOCO Oil Co.*, 200 F.3d 1140, 1152 (8th Cir. 1999) (upholding distribution plan where class members received different levels of compensation and finding that no subgroup was treated unfairly); *S.C. Nat'l Bank v. Stone*, 749 F. Supp. 1419, 1437 (D.S.C. 1990) (approving settlement where some class members did not share in recovery).

The decisions cited above acknowledge that the goal of a distribution plan is fairness to the class as a whole, taking into consideration the strength of claims based on available evidence. In order to develop a fair distribution plan, Lead Counsel, in conjunction with a damages consultant, drafted a Plan of Allocation that will result in a fair distribution of the available settlement proceeds. Lead Counsel discussed their theories of liability and damages with their damages consultant, who used this information along with available economic evidence to develop the plan currently before the Court for approval. Lead Counsel maintain the Plan of Allocation will equitably apportion the net settlement proceeds among all eligible Settlement Class Members using the principles set forth in the case law cited above and should be approved.

V. CONCLUSION

This Settlement is fair, given the presence of skilled counsel for all parties, the complexity of the facts at issue, further substantial expense if this Litigation were to continue to trial, the risks attendant to prevailing on summary judgment, trial, and subsequent appeals, the present benefit of the Settlement to Settlement Class Members, and the arm's-length settlement negotiations. Therefore, for the reasons discussed herein and in the Joint Declaration, Lead Plaintiffs respectfully request this Court to approve the settlement of this Litigation and the Plan of Allocation as fair, reasonable and adequate.

DATED: January 21, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I further certify that I caused this document to be forwarded to the following Designated Internet Site at: http://securities.stanford.edu.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on January 21, 2010.

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